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Rights and the System of Freedom of Expression

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Criticizing the press is a popular habit, and often the critics have good reason. But it is easier to criticize than to propose plausible institutional reforms. And when proposals are made, the debate over them is frequently unsatisfactory. Too often the issue is framed in dichotomous terms. Should we have an autonomous press, or a heavily controlled press? Do we favor an "adversary" relationship between the press and the government, or a "partnership" relationship?

Similarly, too often responses to proposals for reform of the press seem to reflect predispositions and general attitudes. One camp holds that the greatest dangers come from government regulation of the press—that is, government regulation that goes beyond the kind of incidental regulations that apply to other businesses, or that seeks to influence the content of what the press communicates. Others believe that the dangers of such government action are overstated, and that press abuses are sufficiently severe—and remedying them is sufficiently easy—that such regulation should generally be allowed. It seems difficult to focus on the issues in a fine-tuned way that would differentiate among proposed regulations.

These weaknesses in the debate over the regulation of the press reflect a deeper feature of our thinking about issues of freedom of expression: we tend to frame questions about press regulation in such crude terms, and to allow our predispositions to govern, because we lack the conceptual and empirical tools to determine which of the many proposals for regulation of the press is a good idea. In this article, I try to explain why this deficiency in our thinking about the First Amendment exists; why it has come to the fore now; and what we might do to ameliorate it. In order to do

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so, I will rely on a distinction between two different approaches to freedom of expression. The first is an approach based on the rights of the speaker. The second is a "structural" or "systemic" approach: it is based not on the value of the speech to the speaker, but on the value of the speech to the overall system of free expression.

A rights-based justification holds that each individual has a right to speak because speech is in some way especially important to the speaker. Under a rights-based approach, the reason that the government may not suppress speech is, roughly, this: if the particular speakers whom the state proposes to restrict cannot say what they want to say, they will suffer a harm or a loss, and that harm outweighs (in some sense) any legitimate benefit that the restriction might achieve.[1]

A structural justification is sharply different. It holds that freedom of expression is important because of the kind of system that free speech creates or supports. Under a structural or systemic approach, an individual's right to speak is derivative and instrumental. An individual is allowed to assert a right to speak not because it is especially important to that individual to be allowed to speak, but because we can bring about the kind of system we think is desirable only by allowing individuals to speak.

My suggestion is that current First Amendment doctrine is well suited to consider free speech issues when the claim to freedom of expression is based on the rights of the speaker, but not well suited to addressing structural or systemic issues. The regulation of the press presents preeminently structural, not rights-based, issues. That is why issues concerning press regulation present such difficult conceptual problems.

In Part I, I will try to sharpen further the distinction between rights-based and structural justifications for freedom of expression. In Part II, I will offer an explanation of why structural arguments present such difficulty. In Part III, I will make some tentative suggestions of what we might do to deal better with structural issues.

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[1] This view has been stated in a variety of forms. See, for example, C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989); Martin Redish, *The Value of Free Speech*, 130 U Pa L Rev 591 (1982); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U Pa L Rev 45, 59-70 (1974).

I. The Differences between Rights-Based and Structural Arguments

Perhaps the best way to bring into focus the distinction between rights-based and structural justifications is to compare freedom of expression with freedom of religious exercise. By far the most important justification for freedom of religious exercise is the rights-based justification. Although some systemic justifications are offered, they are far less intuitive and important than the rights-based justifications. The contrasts between the right to free exercise of religion and the right to free speech can, therefore, illuminate the difference between rights-based and structural arguments.

Historically, freedom of expression had its roots in the development of the regime of religious toleration.[2] We often think of freedom of expression and freedom of religion in parallel or even identical terms; we refer to the freedom of conscience to include both, or we speak of the freedom to hold one's views and to express them as if these were just different aspects of the same thing.[3] But for all the obvious similarities between freedom of expression and freedom of religious exercise, the two differ in important respects. These differences can be traced to the fact that structural justifications support free speech in ways that they do not support free exercise.

First, a cornerstone of the system of freedom of expression is the belief that robust or even acrimonious debate is a sign of a healthy democracy. This is a theme of many of the classics of First Amendment literature—notably Justice Brandeis's famous opinion in *Whitney v California*[4] and, in a different way, John Stuart Mill's *On Liberty*.[5] By contrast, robust debate about religious is-

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[2] On the development of religious toleration, see, for example, Quentin Skinner, 2 *The Foundations of Modern Political Thought* 241-54 (Cambridge University Press, 1978); Joseph LeCler, *Toleration and the Reformation* (London Publishing Co., 1960).

[3] In such cases as *Widmar v Vincent*, 454 US 263 (1981), and *Lovell v Griffin*, 303 US 444 (1938), the Supreme Court relied on the Free Speech Clause to protect acts of religious expression. See also *Cantwell v Connecticut*, 310 US 296 (1940); Geoffrey Stone, Louis Seidman, Cass Sunstein, and Mark Tushnet, *Constitutional Law* 1510 (Little, Brown & Co., 2d ed 1991) ("Religious beliefs and expression are forms of speech and, as such, are protected by the free speech clause of the first amendment. . . . What, if anything, does the free exercise clause add to the free speech clause?").

[4] 274 US 357, 375-77 (1927) (Brandeis concurring).

[5] John Stuart Mill, *On Liberty* (Hackett Publishing Co., 1978). For a discussion of the emergence of this idea, see Samuel H. Beer, *To Make A Nation* 74-75 (Harvard University Press, 1993). See also Federalist 70 (Hamilton), in Clinton Rossiter, ed, *The Federalist Papers* 426-27 (Mentor, 1961) ("The differences of opinion, and the jarring of parties . . . though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.").

sues is not thought to be a healthy aspect of a democratic political system. If anything, it is a reason to be apprehensive, an indication that a society may be becoming riven on religious lines. As the Supreme Court explained in *Lemon v Kurtzman*:[6]

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.[7]

Acrimony about political issues can be a sign of a healthy seriousness about politics in a society. But acrimony about religion is to be avoided if possible.

Second, a standard (and plausible) justification for freedom of expression is that such a freedom is needed so that people can collectively arrive at a decision on matters of public importance.[8] A correct decision about such matters is more likely if there is full debate than if debate is stifled in some way. Arguments roughly along these lines date back at least to Milton and are a staple in justifications of freedom of expression.[9] But the point of religious toleration is not to allow society to arrive at the truth about religion. The very idea of a publicly ascertainable truth is an anathema to the system of religious toleration, even while the same idea is a presupposition of one of the leading justifications of freedom of expression.

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[6] 403 US 602 (1971).

[7] Id at 622 (citation omitted). See Paul A. Freund, *Public Aid to Parochial Schools*, 82 Harv L Rev 1680, 1692 (1969). This was the basis of the "political entanglement" element of the Supreme Court's test for determining the constitutionality of measures challenged under the Establishment Clause of the First Amendment. See, for example, *Lemon*, 403 US at 622-24; *Meek v Pittenger*, 421 US 349, 372 (1975) (plurality opinion of Stewart); *Committee for Public Education & Religious Liberty v Nyquist*, 413 US 756, 794-98 (1973) (majority opinion of Powell); *Aguilar v Felton*, 473 US 402, 416-17 (1985) (Powell concurring). The Court has since sharply curtailed its use of this aspect of the Establishment Clause test. See *Lynch v Donnelly*, 465 US 668, 684 (1984); *Mueller v Allen*, 463 US 388, 403-04 n 11 (1983). In doing so, however, it did not question that religious divisiveness is generally undesirable in a democracy. See *Lynch*, 465 US at 684. For more general discussion, including an account of the contrast between religious and political division, see Stephen Holmes, *Gag Rules or the Politics of Omission*, in Jon Elster and Rune Slagstad, eds, *Constitutionalism and Democracy* 43-50 (Cambridge University Press, 1988).

[8] See, for example, Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993); Alexander Meiklejohn, *Political Freedom* (Harper & Brothers, 1960).

[9] See John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (Doves Press, 1907) (1st ed 1644).

This is not to suggest that freedom of expression and freedom of religion are inconsistent or that their principal justifications are problematic. The two freedoms are in many ways parallel. In part, freedom of expression rests on rights-based foundations similar to those of freedom of religious exercise. But freedom of expression also has a different foundation, one that rests on its importance to an overall system that seeks some objective—a sound political decision, or perhaps a more general form of truth.

One way to think about the two justifications might be to say that the rights-based justification is rooted in the First Amendment itself; without the First Amendment, the protection of that aspect of freedom of expression (like the protection of freedom of religion) would be left to the legislature. But even without a First Amendment, we might infer from the Constitution—from the parts that establish a representative government—a right to free political debate, at least, because that is necessary to make a representative government work.[10]

It is sometimes suggested that the contrast is between a justification for freedom of expression that rests on notions of "autonomy" and one that emphasizes systemic goals like community self-determination.[11] To the extent this suggestion refers to the autonomy of the speaker, the distinction is similar to the one I am attempting to draw. But this formulation might be misleading if it suggests that the systemic justification does not also serve autonomy. The autonomy at stake in the structural or systemic account is the autonomy of the listeners or the audience, not the autonomy of the speaker. The listeners' autonomy might be impaired if they do not have access to available speech, or if that speech is restricted in a way that expresses disrespect for the audience.[12]

More generally, one might say that any justification emphasizing the value of speech to the speaker is rights-based, while any justifications that emphasize the value to the listener are structural. Listener-based justifications are not always explicitly identified as such, but they are probably closer to the mainstream under-

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[10] See Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 35-51 (Ox Bow Press, 1985).

[11] See, for example, Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L Rev 1405, 1408-11 (1986).

[12] For efforts to base freedom of expression on listener autonomy notions of these general kinds, see T.M. Scanlon, *A Theory of Freedom of Expression*, 1 Phil & Pub Aff 204 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum L Rev 334 (1991). But see T.M. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U Pitt L Rev 519, 530-35 (1979).

standing of the basis of freedom of expression than speaker-based justifications are. For example, in the American legal culture, perhaps the most widely-held view about the basis for freedom of expression is that free speech is "the guardian of our democracy."[13] This is a listener-based justification: free speech is needed because it is valuable to those who hear it. It is also a structural justification: the value of speech lies in the democratic order that it promotes. But this is not (except derivatively) a rights-based justification. The reason for permitting speech is that it will, in some sense, help promote democracy. If an individual has a right to speak, the right is derivative. It exists only by virtue of the value of the speech to the democratic system. The system, not individual rights, ultimately determines what kind of speech should be allowed.

II. The Special Problems of Structural Arguments

The kind of inquiry we need to determine whether a measure is consistent with freedom of expression differs significantly, depending on whether the justification for freedom of expression is rights-based or structural. An aphorism of Alexander Meiklejohn illustrates the point: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[14] That is the idea underlying the structural justification: the value of speech is its value to the overall system, and to the audience that hears the speech, not to the speakers who wish to utter it.

The latter part of Meiklejohn's aphorism captures as well as anything the issues raised by this Symposium, and more generally by the regulation of the press. The problem of a free and responsible press is the problem of making sure that everything worth saying is said. More precisely, the problem is to ensure that everything worth saying is said in such a way that the public can use it. It must be said in a time and place that will make it accessible to the public. It must be said in a way that will make it available to people whose resources of time and attention are limited. And it must be said in a way that allows it to compete effectively with other expression that is no more meritorious (by whatever criterion of merit) but is capable of being expressed more simply and arrestingly. That is the problem that has proved so intractable and that

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[13] See *Brown v Hartlage*, 456 US 45, 60 (1982).

[14] Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 25 (Harper & Brothers, 1948). For a criticism of this notion, see, for example, Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U Chi L Rev 20, 39-40 (1975).

has proved to be so difficult for our conceptual and empirical tools to solve. How do we develop standards for determining the extent to which everything worth saying is being said, and said in a sufficiently accessible form? The structural approach requires that we develop some such standards, but it is far from clear how we might go about doing so.

If speech is protected because of a right in the speaker, it is relatively easy to determine the proper scope of regulation. The problem is to decide whether the interests opposing the right are strong enough to justify limiting the right. This is essentially how freedom of religious exercise worked, at least until recently.[15] If a person believes herself to be under a religious duty to decline to pay taxes, for example, or to use drugs that have been outlawed, or to engage in racial discrimination, the appropriate question is whether the social interests in prohibiting such conduct are strong enough to justify the incursion on religious liberty.

This kind of inquiry is hardly easy, of course. But it is far more manageable than the kind of inquiry that must be undertaken when the justification for expression is structural, or is based on the rights of the listener. Suppose, for example, that the question is whether a television station has shown too much advertising and not enough news programming. Of course, one might ask whether this is a determination that should be made by the government at all. But even if that question is put to one side, the problem remains. The question might be asked, for example, by a self-regulatory body created by the broadcasting industry that is trying to devise standards for the proper mix of news and advertising. The question would be no less intractable.

This is obviously a structural, listener-oriented issue, rather than an issue about the rights of broadcasters to express themselves. And it is a far more complex question than whether religious liberty should yield to a public interest. The problems occur on two levels: in the positive characterization of an existing state of affairs, and in giving a normative account of what a desirable state of affairs would be.

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[15] So far as freedom of religion is concerned, it now appears to be the law that only measures that discriminate against religion are considered infringements on the right. Measures that only have an impact on the ability to practice a religion generally require no special justification. See *Employment Division v Smith*, 494 US 872 (1990). Measures that affect freedom of speech, however, can be unconstitutional even if they are not directed against speech of a certain content. See, for example, *Schneider v State*, 308 US 147 (1930). See, generally, *Leathers v Medlock*, 111 S Ct 1438, 1442-47 (1991).

The positive problem is that it is often difficult to describe, even in the crudest terms, the bias, if any, of a particular mix of expression. During the last presidential campaign, for example, the different career paths of the two principal candidates' spouses set off a debate (or a crypto-debate) over the proper role of women in society. Suppose a question arose about whether the press coverage of that issue was biased in one direction. (Again, one can leave aside any issues about regulation for the moment; assume the question were asked as a matter of self-examination by the press.) How would one decide whether the bias was present? Is there too much speech in favor of women working outside the home, because the elites whose views are propagated by the press are disproportionately of that opinion? Or is the debate biased in the other direction, because so many aspects of the popular culture, endorsed in (for example) television programs, reflect that view?

The same question might be asked about, for instance, racial discrimination. It is for the most part not respectable, at least among the elites, to be an open proponent of racial discrimination. One essentially never encounters an open advocate of racism in the broadcast or print media, except in a context that either discredits the advocate or at least treats him or her as a curiosity. On the other hand, it is certainly plausible to say that the press and broadcast media put forward enormous amounts of material that implicitly endorses racial stereotypes. Decent arguments can, therefore, be made that the mix of expression provided by the media on this issue is biased in each direction.

Not only are there severe difficulties in characterizing the existing mix of expression; it seems at least as difficult to define what an optimal mix would be. Suppose the goal were to give each point of view on a subject—for example, whether women should work outside the home—an equal chance in the so-called marketplace of ideas.[16] Even if an "equal chance" meant an equal number of minutes on television, how would one determine what counts as a point of view on a subject? There are many shadings of opinion on most issues. And even if one could individuate points of view in this way, it is incorrect to assume that equality of minutes of exposure is the same thing as equality of opportunity to persuade. Some positions are significantly harder to adequately explain. In the 1988 presidential campaign, then Vice President George Bush charged that then Governor Michael Dukakis had granted a prison

[16] I will later suggest that this popular metaphor is misleading. See pages 206-07.

furlough to a convicted murderer, who, while out, committed serious crimes. The charge was easily and quickly made. Dukakis's response was not obviously unreasonable on the merits—the Massachusetts furlough program had been instituted by his Republican predecessor; such programs were common; the overall success rate of the program was reasonably high—but it was much more elaborate than the charge.[17] One might define equality in this free speech "market" to require that the more complex side be allowed more time to explain its views; but that would invite abuses and arbitrariness. On the other hand, defining equality in a way that does not allow more time to one side seems to ignore reality and skew the debate.

These structural problems are intractable, conceptually and empirically, in ways that far surpass whatever difficulties there are in balancing rights against countervailing public interests. The issues that have troubled First Amendment law recently have been issues that raised these structural concerns, rather than the rights-based concerns that parallel religious freedom. For example, defining the constitutional limits on selective government subsidization of speech is a notorious problem. The Court's recent cases on the subject are difficult to reconcile and reveal no consistent approach.[18] This is, in most instances at least, a structural problem rather than a problem of defining speakers' rights. The danger is that the government has skewed the system of expression—the free speech "market"—in an unacceptable way.[19]

Other current First Amendment issues of great importance also seem intractable because they raise structural questions. The exceedingly important set of issues concerning campaign finance reform is an example. The Supreme Court's opinions often treat the issue as if the rights of speakers were at stake. But while there is some self-expressive interest involved in having the ability to spend large amounts of money to influence the outcome of an election, it is difficult to believe that those interests would be unduly injured by some reasonable limit on campaign contributions and expenditures, if such a limit were needed to prevent a distortion of

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[17] On this episode, see, for example, Sidney Blumenthal, *Pledging Allegiance: The Last Campaign of the Cold War* 264-65 (Harper Collins Publishers, 1990).

[18] For an analysis of the cases that reaches this conclusion, see Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content-Based Underinclusion*, 1992 S Ct Rev 29, 38-45.

[19] On the dangers that selective regulation will have a "skewing" effect, see, for example, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 198-200 (1983).

the system. The problem is that the danger of distortion operates in both directions. The great threat of a system of campaign finance regulation is that, in the guise of improving the system, it will in fact distort the system in a different direction, by protecting incumbents' interests.[20] Consequently, the difficult First Amendment questions raised by campaign finance reform cannot be answered without addressing structural issues about what a well-functioning speech "market" would look like.

Issues of press responsibility are quintessentially structural, not rights-based, issues.[21] The reason we maintain a free press is not for the sake of the speakers, if by that we mean the owners of the media. The value of a free press is its value to the system of freedom of expression—its value to the listeners and readers. To be sure, many speakers will find that the only way they are able to propagate their views at all effectively, or to an audience of reasonable size, is through the media. For them, press freedom will be a speakers' rights issue as well. But by far the most important value of a free press is its structural value—its value to those who read and listen to the media, and its value in maintaining a healthy overall system of freedom of expression, not its value to speakers.

That is why issues of press freedom and responsibility are so difficult to analyze. It is not just a matter of identifying a right, a countervailing social interest, and the proper balance between the two; not that that is such a simple matter, but it is much easier than the structural question. Structural questions require us to determine the biases of the current system of expression and to describe an ideal, or at least a superior, system. Those are the tasks for which our current tools are inadequate.

In this connection, the popular metaphor of the marketplace of ideas is especially misleading. That metaphor suggests that we have exactly what we in fact lack. We have a good idea of what a well-functioning economic market looks like. In economic markets we can specify what conditions will, if satisfied, lead to results that are in some sense optimal. We can say that an industry is too concentrated, or that information or transaction costs are too high, and that if those conditions are corrected, the market will produce better results.

Those are precisely the kinds of things that it is so difficult to say about speech. We do not have remotely as good a theory about what constitutes a well-functioning speech market, or about what

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[20] See *Buckley v Valeo*, 424 US 1, 31-33 (1976).

[21] I am indebted to my colleague Elena Kagan for this point.

kinds of improvements must be made to ensure that a certain system of expression will produce desirable or optimal outcomes. Perhaps the most pernicious feature of the "marketplace of ideas" metaphor is that it blinds us to this inadequacy in our thinking about freedom of expression.

To summarize my argument so far: the distinctive feature of discussions about the proper role of the press, as well as discussions of several other issues on the frontiers of First Amendment law today, is that they require us to analyze questions concerning the structure of the system of freedom of expression and not just to balance rights of expression against other social interests. Our conceptual and empirical tools, which are fairly well developed to address rights-based issues, are weakest when we attempt to deal with those structural issues.

III. Addressing Structural Issues

What might be done to correct this deficiency? In particular settings we have a reasonably good idea of when a system of expression is well-ordered. A proceeding in court, for example, is a small-scale system of expression. We have elaborate rules (not only the rules of evidence,[22] but rules and rulings allocating time and other resources between the parties) that are designed to ensure that one side does not have an unfair advantage. There are similar rules governing parliamentary assemblies and meetings of organizations of all kinds.[23] At the most abstract level, I believe that one can specify the content of a well-functioning system of freedom of expression by reference to an ideal observer: a well-functioning system is one that would be chosen by a person who wanted to arrive at the correct answer to the questions considered by the system, and had no other interests.[24] But obviously it is difficult to derive from that very abstract formulation specific principles that might be helpful in deciding actual issues. And it is difficult to generalize from the particular cases where we have a sense of what a well-functioning system of expression looks like.

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[22] For an illuminating discussion of the analogy between the rules of evidence and the system of free expression, see Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U Chi Legal F 127.

[23] Compare Harry Kalven, Jr., *The Concept of the Public Forum*, 1965 S Ct Rev 1, 12 ("What is required is in effect a set of Robert's Rules of Order for the new uses of the public forum, albeit the designing of such rules poses a problem of formidable practical difficulty.").

[24] See Strauss, 91 Colum L Rev at 369-70 (cited in note 12).

In the absence of a strong theoretical framework, one thing we can at least do is to collect data that would enable us to reach better-informed conclusions on the central questions raised by any effort to improve the press through regulation.[25] To a large extent, the current presuppositions of First Amendment law treat government regulation as a threat. Undoubtedly that is true sometimes; surely it is sometimes false. If we had a better understanding of when it was true, we could proceed with greater confidence to address the structural issues that have now moved to the fore in First Amendment law. Four possible empirical inquiries seem especially appropriate.

(1) What correlation is there between the views expressed in newspaper editorials, or in the bias given to news stories in both print and broadcast media, and the views of various actors—such as owners, consumers (readers and viewers), and advertisers?[26] The presumption against regulation assumes that an unregulated press will produce an adequate range and diversity of views. We cannot know whether that assumption is true until we know whose views are actually reflected. More important, any regulatory effort should be directed to correcting the biases that exist. If, for example, the media principally reflect the views of advertisers, that suggests one regulatory approach.[27] If the media reflect the biases of consumers, the case against regulation is far stronger.

(2) How independent of political influence has public broadcasting been? Public broadcasting in the United States has a twenty-six year history.[28] We should by now be able to arrive at a reasonably accurate estimate of whether it is possible to sustain a system of public broadcasting without undue political influence. To the extent political independence cannot be maintained, the presumption against regulation is strengthened; to the extent it can, government ownership of one among many competing media outlets should be viewed as a possible structural corrective to biases existing in the system.

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[25] On the need for expanded empirical investigation of the foundations of First Amendment law, see Robert C. Entman, *Putting the First Amendment in its Place: Enhancing American Democracy through the Press*, 1993 U Chi Legal F 61; L.A. Powe, Jr., *The Supreme Court, Social Change, and Legal Scholarship*, 44 Stan L Rev 1615 (1992).

[26] See C. Edwin Baker, *Advertising and a Democratic Press*, 140 U Pa L Rev 2097 (1992).

[27] See id at 2200-19.

[28] See, generally, *Public Television: A Program for Action, The Report and Recommendations of the Carnegie Commission on Educational Television* (Bantam Books, 1967).

(3) What have been the effects of FCC regulation of the broadcast media? The dual system of regulation of the media in this country has, in effect, conducted a natural experiment over the last half-century. The broadcast media have been regulated by the FCC; the print media have been left unregulated.[29] A comparison of the two media might go a long way in helping to assess the real risks of government regulation. Has the result been a substantial difference in political orientation, willingness to criticize the government, or some other material aspect of the content of the speech engaged in by the print and broadcast media respectively?

(4) What effect has government ownership or regulation of content had on the media in other, similar societies, especially on the propensity of the press to criticize the government? First Amendment scholarship, like much of American constitutional law scholarship, has been distinguished by its lack of interest in comparative studies. The American doctrines governing hate speech, for example, have developed without any apparent consideration of the fact that laws forbidding hate speech are commonplace in other democracies. Of course, that does not mean that such laws should necessarily be adopted here; it may be that the experience of other nations demonstrates that we should not follow the same path, or the differences in cultures and political systems may mean that there is little to be learned by comparative study. But at least there is a basis for empirical study that should not be neglected.

The same is true of the structural issues concerning the press that are the subject of this Symposium. Western European nations display a variety of forms of government ownership and regulation of the press. It may be difficult to extrapolate directly from their experience. But some aspects of their experience are likely to be instructive. In any event, an inquiry into the proper structure of regulation of the press in America should not proceed in ignorance of the experience of similar nations.

Freedom of expression is a developing and highly elaborate area of constitutional law that attracts a great deal of thoughtful attention. But there is a sense in which the most interesting problems in the system of freedom of expression—conspicuously including the proper scope of regulation of a "free and responsible

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[29] See Lee C. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 Mich L Rev 1, 27 (1976) (this difference in the treatment of the media is "the best of both worlds"). These ideas are further developed, with emphasis on the notion of an "experiment," in Lee C. Bollinger, *Images of a Free Press* ch 5 (University of Chicago Press, 1991).

press"—are not well addressed by current First Amendment doctrine or current First Amendment thought. In this article, I have suggested that the reason for this is that the nature of the most important problems has shifted in a fundamental way. Today First Amendment rights, conceived as the rights of the speaker, are, to a greater and greater extent, important mostly in a derivative sense. They are important because they serve broader systemic and structural values. Until we have the conceptual and empirical tools to address those structural issues, solutions to many of today's problems will continue to elude our grasp.